BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARSHALL ANDERSON Claimant	)	
VS.	)	
DAVID CRAIG & LARRY JOHNSON & BOWSER JOHNSON MORTUARY Respondents	)	Docket No. 1,020,470
AND	)	
TWIN CITY FIRE INS. Insurance Carrier	)	
AND	)	
WORKERS COMPENSATION FUND Fund	)	

ORDER

Respondent Larry Johnson, Bowser Johnson Mortuary (Bowser Johnson) and its insurance carrier Twin City Fire Insurance (collectively referred to as respondent) request review of the May 24, 2005 Order for Compensation entered by Administrative Law Judge (ALJ) Brad E. Avery.

ISSUES

The ALJ found that claimant suffered an accidental injury arising out of and in the course of employment with Bowser Johnson, an entity that he concluded was claimant's statutory employer on the date of the accident. He also found that timely notice was provided. The ALJ specifically concluded that "[c]laimant was maintaining property owned by Larry Johnson, the owner of the [Bowser Johnson] mortuary when claimant was injured. The mortuary was using the facility to store cars owned by it and Mr. Johnson, thereby creating a sufficient nexus with the funeral home. Maintenance of the facility in question

would be part of the employer's trade or business."[1] Accordingly, the ALJ awarded claimant temporary total disability benefits and medical treatment, all to be provided by Bowser Johnson and its carrier. The ALJ made no findings with respect to Larry Johnson individually or David Craig and his status as claimant's purported employer.

This respondent urges the Board to reverse the ALJ's decision as it contends the ALJ erred in finding Bowser Johnson was the respondent's statutory employer under K.S.A. 44-503(a) for purposes of the painting work claimant was performing on a building which housed old cars and equipment. Respondent argues that the facts do not support such a conclusion as painting is not part of Bowser Johnson's "trade or business". And that as a result, the ALJ exceeded his jurisdiction in finding a statutory employment relationship.

In addition, respondent contends there is no evidence within the record of any employment relationship between claimant and David Craig which would be covered by the Act because Mr. Craig's payroll does not meet the statutory criteria set forth by K.S.A. 44-505(a). Finally, respondent contends the ALJ exceeded his jurisdiction in awarding temporary total disability benefits because there is no medical evidence indicating claimant is presently unable to work.

Claimant argues that this appeal should be dismissed as the Board does not have jurisdiction over an appeal where the issue is whether a respondent is a statutory employer as defined in K.S.A. 44-503(a).

The Workers Compensation Fund (Fund) also filed a brief in this matter based upon claimant's contention that Mr. Craig has not secured workers compensation insurance and was not financially able to pay any benefits that might be due. However, the Fund contends that there is insufficient evidence to indicate that it should be involved as Mr. Craig did not have a gross annual payroll over $20,000 at the time of the alleged accident or before, and he did not file an election to come under the Act. Therefore, the Fund requests that the Board dismiss it from this claim.

The issues to be determined are 1) Whether the Board has jurisdiction over this appeal; 2) Whether Bowser Johnson is claimant's statutory employer; 3) Whether the parties are covered by the Workers Compensation Act; 4) Whether the ALJ exceeded his jurisdiction in awarding temporary total disability benefits; and 5) Whether the Fund should be dismissed from this action.

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[1] ALJ's Order for Compensation (May 24, 2005) at 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

In August 2004, claimant and David Craig entered into an arrangement whereby Mr. Craig would, on occasion, pay claimant $8 per hour to help him paint buildings or install insulation. Before his injury, claimant earned $100 from one particular job installing insulation. On another job, claimant earned $230 for painting. Then, in October of 2004, Mr. Craig agreed to paint a commercial building for Larry Johnson, an individual who owns Bowser Johnson, a local funeral home. This was not the only project Mr. Craig agreed to do for Mr. Johnson. There were other rental homes that Mr. Craig painted and for which he received payment.

Mr. Johnson apparently owns quite a few properties and according to claimant, other than this painting and some plumbing activities, Mr. Johnson does most of the maintenance work himself.[2] Precisely what work he performs is unclear from the record.

The building Mr. Johnson asked Mr. Craig to paint formerly housed his mortuary, although it is no longer actively used in that business. This building does, however, house cars that had, in the past, been used in the funeral home business. At some point in time Mr. Craig asked claimant to help on this painting job. Mr. Craig testified that for this project he was not paying claimant. Rather, he owed claimant money and claimant agreed to come help out on this job so Mr. Craig could get paid and, in turn, pay claimant the money he owed him from earlier jobs. Claimant maintains they had a standing agreement for $8 per hour and that he was expecting payment for his time incurred in this painting project.

On October 25, 2004, claimant was standing on a ladder helping Mr. Craig when the ladder slipped, causing claimant to fall to the ground, hurting his left elbow. Mr. Craig took claimant to the hospital where he was ultimately treated by Dr. Kenneth E. Teeter, an orthopaedic surgeon.

Claimant filed this claim against both Mr. Craig, his direct employer, and against Larry Johnson, individually, and Mr. Johnson's company, Bowser Johnson. The Fund was also impled as claimant apparently had some concern about insurance coverage on the part of Mr. Craig. During the course of discovery, in advance of the preliminary hearing, it became clear that Mr. Craig's payroll history was likely insufficient to meet the statutory threshold. So, claimant focused his efforts on Bowser Johnson, as the statutory employer under K.S.A. 44-503(a).

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[2] Johnson Depo. at 7.

The ALJ concluded there was a connection between Bowser Johnson and claimant sufficient upon which to predicate an employment relationship. He reasoned that "[c]laimant was maintaining property owned by Larry Johnson, the owner of the mortuary when claimant was injured. The mortuary was using the facility to store cars owned by it and Mr. Johnson, thereby creating a sufficient nexus with the funeral home. Maintenance of the facility in question would be part of the employer's trade or business."[3]

The Board must first address claimant's contention that there is no jurisdiction over this appeal. On appeals from preliminary hearing orders, the Board has limited jurisdiction. The Board's jurisdiction is limited to review of contentions that the ALJ has exceeded his/her jurisdiction. In addition, in K.S.A. 44-534a, the legislature designated certain issues as jurisdictional issues. These include findings with regard to whether claimant suffered an accidental injury, whether the injury arose out of and in the course of employment, whether notice is given or claim timely made, or whether certain defenses apply.

The underlying issues stemming from the compensability question are, in the Board's view, jurisdictional. At the heart of this appeal is whether claimant's injury arose out of and in the course of his *employment*, specifically whether as a statutory employee of Bowser Johnson or as a direct employee of David Craig. Inherent in that question is the nature of the relationship between those parties. These contentions satisfy the threshold criteria and vest the Board with jurisdiction to consider portions of respondent's appeal.

The Board, however, agrees that is has no jurisdiction to consider the issue of temporary total disability benefits as that is not one of the items enumerated in K.S.A. 44-534a. Similarly, the Fund's request to be dismissed at this juncture of the claim is not one that the Board has the power to address. Thus, these two issues are dismissed for lack of jurisdiction.

The legislature has expressly stated that the Workers Compensation Act shall be liberally construed for the purpose of bringing employees and employers under the provisions of the Act.[4] For a claimant to be eligible to receive benefits under the Workers Compensation Act, the claimant has to be an employee of the respondent. An employee is defined by the Workers Compensation Act as any person who has entered into the employment of or works under any contract of services or apprenticeship with an employer.[5]

The primary test utilized in Kansas to determine whether an employee/employer relationship exists is whether the employer has the right of control and supervision of the

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[3] ALJ Order for Compensation (May 24, 2005) at 1.

[4] K.S.A. 44-501(g)

[5] *See* K.S.A. 2004 Supp. 44-508(b).

work of the employee. This involves the right to direct the manner in which the work is performed as well as the result which is to be accomplished. It is not the actual exercise of control, but the right to control which is determinative.[6]

In this instance, the evidence seems clear that there is an employment relationship between claimant and David Craig. Claimant was hired to help Mr. Craig perform painting services on a job-by-job basis, earning $8.00 per hour. Even Mr. Craig testified that he considered claimant and another individual who also periodically helped out as employees. Although Mr. Craig has testified that he had not agreed to pay claimant on the day that claimant was injured, the Board is more persuaded by claimant's version of the events. Specifically, that he was working for Mr. Craig on the day he was injured, handing him roofing tools and that he expected to be paid. Accordingly, the Board finds claimant was an employee of Mr. Craig on the date of his injury.

Unfortunately, Mr. Craig's testimony makes it equally clear that he did not and cannot reasonably expect to have sufficient payroll to meet the statutory threshold. It is the claimant's burden of proof to establish his right to an award of compensation and to prove those conditions on which the claimant's right depends.[7] Claimant's burden to prove coverage under the Act, also includes whether respondent has the requisite payroll requirements as set forth in K.S.A. 44-505(a).[8] The pertinent provisions of K.S.A. 44-505(a) provide as follows:

> . . . the workers compensation act shall apply to all employments wherein employers employ employees within this state *except* . . .
>
> (2) any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, . . . (emphasis added)

In this instance, it does not appear that Mr. Craig had or reasonably can expect to have a payroll in excess of $20,000. Therefore, the Act does not apply to Mr. Craig and claimant cannot recover workers compensation benefits from him.

The Board also finds there is no evidence of a direct employment relationship between claimant and Larry Johnson or Bowser Johnson. Mr. Johnson did not even know

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[6] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994); *Falls v. Scott*, 249 Kan. 54, 815 P.2d 1104 (1991); and *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[7] *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990).

[8] *Brooks v. Lochner Builders, Inc.*, 5 Kan. App. 2d 152, 613 P.2d 389 (1980).

who claimant was or that he had been involved in the painting project. It was only after the accident that Mr. Johnson ever became aware of claimant's existence. Thus, the Board finds that claimant and Larry Johnson or Bowser Johnson did not have any employment relationship.

Alternatively, the law recognizes an additional theory for the claimant to recover against respondent Larry Johnson and Bowser Johnson Funeral Home. K.S.A. 44-503(a) extends the application of the Workers Compensation Act to certain individuals and entities who are not the immediate employers of an injured worker.[9] The purpose of that statute is to prevent employers from evading liability under the Workers Compensation Act by contracting with others to do the work that they have undertaken as a part of their trade or business.[10] The statute provides:

> Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal;. . . .

The test under K.S.A. 44-503(a) is whether the work that gave rise to the injury was part of the principal's trade or business has two prongs:

> (1) [I]s the work being performed by the independent contractor and the injured employee necessarily inherent in and an integral part of the principal's trade or business?
>
> (2) Is the work being performed by the independent contractor and the injured employee such as would ordinarily have been done by the employees of the principal?[11]

In *Bright*, the Court analyzes the first prong and makes the activities of similar employers the key in determining whether the work being performed at the time of the accident was either an integral part of or inherent in the principal's trade or business.[12]

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[9] *Bright v. Cargill, Inc.*,251 Kan. 387,837 P.2d 348 (1992); *Hollingsworth v. Fehrs Equip. Co.*, 240 Kan. 398, 729 P.2d 1214 (1986).

[10] *Id.* at 393; *Zehring v. Wickham,* 232 Kan. 704, 658 P.2d 1004 (1983).

[11] *Id.*; *Hanna v. CRA, Inc.*, 196 Kan. 156, 409 P.2d 786 (1966).

[12] *Id.* at 399.

Here, respondent states that the building in question has been vacant and not used for any business purpose related to the funeral home business for some time. And there is no evidence that any of the mortuary employees had ever undertaken any repair, maintenance or even any painting of the building. While it is true that the building housed old cars formerly used in the funeral business and the building is owned by Mr. Johnson, the connection to the mortuary business ends there. Nothing else associated with the business of a funeral home goes on within this building. It seems the primary connection to the mortuary business is the fact that Bowser Johnson and the old mortuary building are owned by Larry Johnson and all payments made to Mr. Craig were made on Bowser Johnson checking accounts. Under these facts and circumstances, at least as the evidence is presently developed, the Board finds the ALJ's legal conclusion should be reversed. The Board concludes that Bowser Johnson is not claimant's statutory employer under K.S.A. 44-503(a). Rather, he was an employee of an independent contractor.

Generally, an independent contractor is someone who contracts to perform a piece of work according to his own methods and without being subject to control of an employer, except as to final result. A master, however, is someone who employs another to perform services in his affairs and who controls or has the right to control the conduct of the other in performing those services. It is the right to control, not the actual exercise of that right that is important.[13] In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are (1) the existence of a contract to perform a certain piece or kind of work at a fixed price, (2) the independent nature of the worker's business or distinct calling, (3) the employment of assistants with the right to supervise their activities, (4) the worker's obligation to furnish necessary tools, supplies, and materials, (5) the worker's right to control the progress of the work, (6) the length of time for which the worker is employed, (7) whether the worker is paid by time or by job, and (8) whether the work is part of the regular business of the employer.[14]

The relationship of contracting parties depends on all the facts and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[15]

Under these facts, the Board finds that claimant was employed by Mr. Craig who in turn, was employed by Larry Johnson and/or Bowser Johnson as an independent

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[13] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984); and *Evans v. Board of Education of Hays*, 178 Kan. 275, 284 P.2d 1068 (1955).

[14] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994)

[15] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

contractor to paint the old mortuary building. Mr. Johnson did not control the method of the painting project. While he did provide the supplies, Mr. Craig provided the ladder and all the labor to complete the project. No time line was provided nor required by Mr. Johnson. Mr. Craig was paid a flat fee for the job and not an hourly rate. When taken together, the Board believes this to be indicative of an independent contractor relationship. Accordingly, no benefits are due under the Act.

For the foregoing reasons, the ALJ's Order for Compensation is reversed and set aside.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated May 24, 2005, is dismissed in part and the balance of the findings are reversed and set aside.

IT IS SO ORDERED.

Dated this _____ day of July, 2005.

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BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant
Patricia A. Wohlford, Attorney for Respondent and its Insurance Carrier
Matthew S. Crowley, Attorney for the Kansas Workers Compensation Fund
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director